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**Integrating Consumer Behaviour Insights in Competition Enforcement – Note by BIAC**

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This document reproduces a written contribution from BIAC submitted for Item 9 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/behavioural-insights-in-competition-enforcement.htm>

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## *BIAC*

### 1. Introduction

1. Competition enforcement agencies rely on models to identify perceived anti-competitive actions. Such models are based on assumptions that are not always accurate, but nevertheless provide a predictable reference framework and starting point to assess the actions being investigated. In particular, the assumptions on which such models are often based, including the notion that market participants are rational and pursue their economic self-interest with perfect willpower and insight, have been put into question by behavioral economists who have pointed to the existence of biases and heuristics, imperfect willpower, and the fact that market participants do not necessarily only care about their own economic self-interest.<sup>1</sup>

2. Consumer behavior insights may play a legitimate role in fine-tuning some of the assumptions about consumer behavior in antitrust enforcement. However, it should be noted that traditional competition policy assessment tools often sufficiently account for the existence and effects of consumer biases.<sup>2</sup> As such, such insights can be material in those cases where traditional tools fail to properly account for the implications of these biases and to the extent that they do not undermine the predictability of competition enforcement systems.

3. *Business at OECD* (BIAC) believes that consumer behavior insights can in well-defined circumstances play a useful role in complementing and supporting proven and established approaches and methods, but should not lead to an overhaul of traditionally adopted analytical frameworks by adopting potentially arbitrary presumptions on the general implications of possible behavioral bias on the health of the competitive process.<sup>3</sup> In other words, behavioral insights can in specific circumstances play a useful role in fine-tuning certain assumptions and analyses, rather than providing the analysis framework itself.<sup>4</sup> In particular, it is unclear that harmless user behavior should be corrected under the assumption that such change will increase the odds of success of competitors—in particular when such change imposes costs on the consumer. The situations when this is an optimal policy measure with material impact are likely to be limited. A thorough competition

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<sup>1</sup> OECD, Annex to the Summary Record of the 115th Meeting of the Competition Committee held on 13-14 June 2012—Summary Record of the Discussion on Behavioural Economics, DAF/COMP/M(2012)2/ANN5/FINAL, at 2 (May 13, 2016), [https://one.oecd.org/document/DAF/COMP/M\(2012\)2/ANN5/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2012)2/ANN5/FINAL/en/pdf).

<sup>2</sup> Oxera (Prepared for The Netherlands Authority for Consumers and Markets (ACM)), Behavioural Economics and Its Impact on Competition Policy, A Practical Assessment With Illustrative Examples From Financial Services 60 (May 2013), [https://www.acm.nl/sites/default/files/old\\_publication/bijlagen/11586\\_oxera-behavioural-economics-competition-policy.pdf](https://www.acm.nl/sites/default/files/old_publication/bijlagen/11586_oxera-behavioural-economics-competition-policy.pdf).

<sup>3</sup> See Derek Ireland, Practical Guide to Applying Behavioral Economics To Competition Policy and Law In Developing Economies 26 (July 21, 2021), <https://ssrn.com/abstract=3891036>.

<sup>4</sup> To provide an illustration, it would for instance (understandably) be hard to conceive that a competition authority would be minded to authorize a merger that would substantially lessen competition on the basis that consumer behavioral insights have shown that having less choice would help reduce consumer product choice and decision overload in the relevant market. See *id.* at 26.

analysis in the relevant case at hand should not be foregone due to the mere existence of relevant consumer behavior insights.

## 2. The Role of Consumer Behavior Insights in Sensible and Rational Competition Law Enforcement

4. Intrinsically, consumer behavior insights are more likely to be relevant to the extent traditional analytical frameworks fail to account for the behavior of consumers in a particular market, and where the behavior of consumers is a central element in a particular case. Such insights would appear to be less immediately relevant in a pure inter firm dispute where the behavior of consumers is not a central element of the case.<sup>5</sup>

5. In a competition policy setting, behavioral insights appear particularly relevant where a company purposely exploits cognitive biases to mislead users in a way that prevents competition. The most frequent allegations refer to designs or prompts that intentionally increase stickiness and reduce switching to the clear detriment of the user and competitors. Yet, not all lack of switching should be attributed to behavioral bias and product superiority and consumer preference cannot be dismissed as an explanation of stickiness in the face of multiple options.<sup>6</sup> Also, the extent to which convenience, in the form of pre-installed products for example, needs to be traded for choice is not a straightforward question.

6. It is also unclear that all tactics to decrease switching by users are necessarily anticompetitive. Companies often legitimately take actions to increase customer stickiness by building brand loyalty or offering convenience in the form of integrated solutions. Even if this conduct arguably leads to some “softening of competition,” it need not be harmful to users – just as intentional product differentiation may soften competition without causing consumer harm. Applying behavioral insights should not lead to setting a particular consumer behavior (i.e., switching) as the policy goal.<sup>7</sup>

7. It should be noted that competition authorities have not waited for debates surrounding the use of consumer behavior insights to be concluded to rely on the latter. In relation to the substantive assessment of competition cases, consumer behavior biases, such as consumer inertia, have for instance been relied on to reach findings of market power despite low market shares.<sup>8</sup> As is well established, while market shares can be a useful preliminary tool to assess market power they are not, by themselves, indicative of market power. To mention another example,<sup>9</sup> the European Commission has also relied on such

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<sup>5</sup> Oxera, *supra* note 2, at 60. The OECD Call for Contributions for this Roundtable (dated February 11, 2022) indicated that the session will not address behavioral aspects in firms, so this aspect will not be covered in this submission.

<sup>6</sup> For example, it appears that more than half of iOS users use Google Maps on their phone even though Apple Maps is preinstalled. So finding that most Android users use pre-installed Google Maps cannot immediately be assigned to default bias. See *How Many People Use Google Maps Compared to Apple Maps (July 2021)*, <https://www.justinobeirne.com/how-many-people-use-google-maps-compared-to-apple-maps#note5>.

<sup>7</sup> For example, as part of its investigation into retail banking, the UK Competition and Markets Authority (CMA) sought to increase consumer retail banking switching rates. Despite these efforts, bank switching levels remain very low in the UK.

<sup>8</sup> Oxera, *supra* note 2, at 37-38.

<sup>9</sup> Andreas Heinemann, *Facts Over Theory: The Contribution of Behavioral Economics to Competition Law* 5, *CPI Antitrust Chron.* 5 (Jan. 2019),

insights to consider that “end-user inertia” and “status quo bias” related to pre-installation were relevant factors to take into consideration in its finding of abuses of dominant positions in the *Microsoft (Windows Media Player)*<sup>10</sup> and *Google (Android)* cases.<sup>11</sup>

8. To the extent that such insights are relied on by competition authorities, BIAC submits that companies should obviously also be able to rely on such insights to dispel unsubstantiated competition concerns. For instance, BIAC submits that firms should be able to rely on such insights to demonstrate that no market power exists despite high market shares. Another point of view that has been put forward stemming from consumer behavior insights is that in certain circumstances market power may be exploited less often than predicted under the rational agent model due notably to concerns that customers will perceive price increases as grossly unfair and illegitimate and will therefore seek to punish the relevant company by consumers responding emotionally and “irrationally” to such increases.<sup>12</sup>

9. In relation to remedies, competition authorities may understandably want to take behavioral insights into account to ensure the effectiveness of such remedies. Famously, the remedy imposed by the European Commission requiring Microsoft in the above-mentioned case to sell a version of Windows not including the Windows Media Player was a failure, and only a few thousand copies were sold in Europe.<sup>13</sup> This remedy arguably was not successful, because it did not sufficiently consider consumer behavioral insights.

10. While ineffective remedies may be due to poor design, BIAC notes that they may sometimes also be reflective of a lack of a true underlying competition issue.<sup>14</sup> Depending on the context, imposing as remedies requirements that go beyond relevant consumer protection legislation may then be problematic.

11. While behavioral economics may be helpful to inform competition agencies’ insights into market definition, market power, remedies and related topics in a given case, BIAC notes that competition agencies appear not to have squarely and structurally focused yet on the interplay between consumer bias on the one hand, and the deterrent effect of competition rules and compliance with those rules on the other hand. For example, de Moncuit suggests that agencies may consider making legal rules more understandable to overcome “aversion-to-ambiguity,” thereby potentially enhancing compliance. Similarly,

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<https://www.competitionpolicyinternational.com/wp-content/uploads/2019/01/CPI-Heinemann.pdf>.

<sup>10</sup> Case COMP/C-3/37.792—Microsoft Corp., Comm’n Decision, ¶ 870 (Mar. 24, 2004) (summary at 2007 O.J. (L32) 23), available at [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37792/37792\\_4177\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_3.pdf).

<sup>11</sup> Case AT.40099—Google Android, Comm’n Decision, ¶ 782 (July 18, 2018) (summary at 2019 O.J. (C 402) 19, available at [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40099/40099\\_9993\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf)).

<sup>12</sup> Ireland, *supra* note 3, at 99-100.

<sup>13</sup> See Kevin J. O’Brien, *As Europe Debated, Microsoft Took Market Share*, *New York Times* (Sept. 17, 2007), <https://www.nytimes.com/2007/09/17/technology/17soft.html>.

<sup>14</sup> Apparently effective remedies may also not be game changers: the browser choice screen imposed on Microsoft by the European Commission during the years 2010-2014 following the investigation of Microsoft’s tying of Internet Explorer (IE) is often cited as an example of successful pro-competitive intervention. Yet, the U.S. also exhibited a sharp drop of IE usage over the years without any regulatory intervention. See *Market Share Held by Leading Internet Browsers in the United States From January 2015 to December 2021*, Statista (Jan. 2022), <https://www.statista.com/statistics/545520/market-share-of-internet-browsers-usa/>.

effective compliance programs may have to take into account of (conflicting) bias of companies' executives to adopt unlawful conduct.<sup>15</sup>

12. In addition to taking consumer behavior insights into account, BIAC believes that competition authorities should also seek to confront their own biases. Such biases can take many forms and their risks are well-documented.<sup>16</sup> In particular, it has been suggested that here is an obvious risk of “framing bias” when identifying a relevant market and/or preparing a questionnaire for consumers as part of a market definition exercise, e.g., asking them how they would react to a SSNIP.<sup>17</sup> Behavioral insights can and should inform such processes so that they yield results that are reliable. It has been suggested that a good way of diminishing such risks would be for competition authorities to start all questionnaires with open ended (non-leading) questions and to use experiments to confirm results of surveys.<sup>18</sup> Another documented type of competition authority bias may be to prosecute certain companies because other competition authorities have done or because of political pressure to do so.<sup>19</sup> This phenomenon also arises in multi-jurisdictional merger reviews when authorities in countries where there are no competition concerns insist on in-depth reviews simply because there are other countries where genuine competition concerns arise. This could lead to authorities insisting on identical remedy packages when the competition concerns between countries are not at all comparable.

### 3. Safeguards to Prevent Agencies Over-Enforcing the Law or Taking Ill-Informed Decisions

13. In the opinion of BIAC, integrating consumer behavior insights into competition enforcement may become problematic when, rather than merely serving as a means of fine-tuning the analysis of actual anti-competitive conduct, it leads competition authorities to seek to—through processes exclusively aimed at addressing anti-competitive conduct—address perceived shortcomings in their consumer protections laws (or other sectoral regulations) that have no basis as independent antitrust violations. BIAC submits that such an approach, which is in effect a disguised rewriting of consumer protection laws through the use of competition laws, risks harming the coherence, integrity, trust, and predictability of competition enforcement systems.

14. Perceived market failures do not necessarily result from competition breaches, and competition enforcement is not necessarily the appropriate approach to deal with such issues. The risk here is of consumer behavior insights leading to over-enforcement. Competition enforcers should be ready to pass on such matters to relevant consumer protection authorities where there is no clear case for antitrust enforcement.<sup>20</sup>

15. More broadly, BIAC is of the opinion that authorities should also avoid the temptation to unduly second guess consumer's choices, try to correct any perceived market failures—which may not be market failure to start with—and act in an unduly paternalistic

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<sup>15</sup> Godefroy de Moncuit, *Relevance and Shortcomings of Behavioural Economics in Antitrust Deterrence*, 11 J. Eur. Competition L. & Prac. 228 (2020).

<sup>16</sup> Ireland, *supra* note 3, at 46-47.

<sup>17</sup> Oxera, *supra* note 2, at 32.

<sup>18</sup> *Id.* at 48-49.

<sup>19</sup> Ireland, *supra* note 3, at 96.

<sup>20</sup> See *id.* at 43.

manner by necessarily assuming that they know best what consumers should or should not do. Authorities should not readily assume consumers are not aware of their own biases or that they do not take these into account when taking/not taking decisions. Trying to dictate what consumers should do may not be appropriate in the context of free market economies. Anything more than a nudge “in the right direction” may be unjustified.

16. More fundamentally, the most adequate tools for addressing perceived consumer choice biases and shortcomings leading to consumer harm are consumer protection laws and disclosure requirements, rather than competition enforcement. This has become even more self-evident as authorities acquire tools that are at least to some extent specifically designed to address perceived market failures linked to alleged consumer behavioral biases. One such instrument is the EU’s Digital Markets Act, which is formally not a competition law instrument.

17. It goes without saying that the consumer insights relied upon must not be flawed. Flawed insights will inevitably lead to wrong conclusions being drawn. It may well be the case that such behavioral insights are less clear and less well understood when it comes to complex multi-sided markets and platforms in the digital economy, and other highly innovative markets. Where findings related to consumer behavior insights are disputed or questioned, particular caution is warranted. In this respect, de Moncuit notes that there may be numerous biases at play in a given case, which “make it impossible to know what the behavioural agent would do in any given situation.”<sup>21</sup> Any use of behavioral economics in competition law enforcement should therefore be particularly robust and based on well-established principles of empirical research.

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<sup>21</sup> See de Moncuit, *supra*, note 15.